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In the

Supreme Court of the United States

APRIL TERM, 1977

No. 77-23[redacted]

Lonnie McLucas,
Petitioner

v.

State of Connecticut,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The Petitioner, Lonnie McLucas, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on March 15, 1977. The Petitioner's Motion to Reargue was denied on April 5, 1977.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 38 Conn. L.J. No. 37 and is reprinted in the Appendix hereto.

STATEMENT OF JURISDICTION

The Petitioner was convicted after a jury trial in the Superior Court of the State of Connecticut of conspiracy

to commit murder and was acquitted of three other charges.

The conviction was affirmed by the Supreme Court of the State of Connecticut on March 15, 1977. A Motion to Reargue was denied on April 5, 1977, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. a) Is the Freedom of Information Act, Title 5 U.S.C. Sec. 552 (b) (7), grounds for quashing subpoenas issued to F.B.I. officials during the course of a state criminal trial in order to compel evidence regarding electronic surveillance of the defendant?

b) When there is a claim of an illegal arrest, may a court determine the admissibility of statements flowing from that arrest without determining the nature of the official misconduct constituting the illegality?

2. Did the refusal of the trial court in a conspiracy trial to consider a motion to grant immunity to defense witnesses after granting such immunity to a prosecution witness deprive the defendant of due process of law?

3. Does an officer of a political organization whose office and headquarters are searched have standing to contest the search and subsequent seizures, even though he is not present at the time the search is conducted?

STATUTES INVOLVED

As to question 1, the statutes involved are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, Title 5 U.S.C. Sec. 552 (b) (7), and Titles 18

U.S.C. Secs. 2515 and 2518. As to question 2, the statutes involved are Sec. 54-47a, Connecticut General Statutes, and the Sixth and Fourteenth Amendments to the Constitution of the United States. As to question 3, the constitutional provisions involved are the Fourth and Fourteenth Amendments to the Constitution of the United States. These constitutional provisions and statutes are set forth in pertinent part in the appendix hereto.

STATEMENT OF THE CASE

The Petitioner, Lonnie McLucas, was tried on charges arising from events culminating in the death of Alex Rackley in New Haven, Connecticut. The Petitioner and several others had established a branch of the Black Panther Party in New Haven with Party headquarters in a house at 365 Orchard Street, rented by Warren Kimbro, one of the Party members.

On or about May 17, 1969, George Sams arrived at 365 Orchard Street with Landon Williams and Alex Rackley. Sams claimed he had been sent by the National Black Panther Party to supervise the New Haven Chapter. The following day Sams began to inflict "discipline" on Rackley for alleged misdeeds. Sams, who always wore and frequently brandished a gun, intimidated others in the house (T. 1842) and ordered occupants of the house to interrogate and physically punish Rackley. Telling the Petitioner that he was going to let Rackley go (T. 1863), Sams ordered the Petitioner, accompanied by Kimbro, to drive to a wooded spot, where Sams ordered Kimbro to shoot Rackley. (T.F.V. R. 187). Kimbro ordered Rackley into the woods and, in the absence of the others, shot him through the head. Kimbro returned to the car. Sams then ordered the Petitioner to fire another shot at Rackley's body. (Tr. F.V. 187-9, T. 1867-9).

I. The Petitioner was arrested on a federal fugitive

warrant by agents of the Federal Bureau of Investigation in Salt Lake City, Utah. Petitioner on February 16, 1970, and May 5, 1970, moved to suppress statements made to federal and Connecticut authorities susequent to the arrest on the ground that they were tainted by the illegality of the arrest and were therefore inadmissible (Tr. 398). The trial court denied the motions with leave to renew them at the time of trial. When the prosecution sought to introduce the statements at trial, Petitioner attempted to prove the use of illegal electronic surveillance and issued two subpoenas directed to agents of the Federal Bureau of Investigation seeking testimony and documents concerning illegal electronic surveillance. One of the subpoenas sought to elicit evidence concerning the illegality of the Petitioner's arrest; the second sought to elicit other material evidence derived as a result of unlawful electronic eavesdropping on the Black Panther Party headquarters in New Haven. (Trial F. 34). The United States Attorney moved to quash the subpoenas on the ground that the Freedom of Information Act, 5 U.S.C. Sec. 552 (b) (7), barred the use by the Petitioner of compulsory process to secure the information sought. The trial court granted the motion to quash, thereby refusing to hear evidence regarding the illegality of the arrest. (T. 921). The court then found that since *Miranda* warnings were given, the statements were voluntary. The court admitted the statements into evidence without consideration of the illegality of the arrest. (T. 926).

The Connecticut Supreme Court upheld the quashing of the subpoenas on the basis of Sec. 552 (b) (7) and approved the trial court's procedure in admitting the statements.

II. Twelve other members of the New Haven Black Panther Chapter and National Chairman Bobby Seale were charged with related crimes along with the Petitioner. Because of the order in which the various proceedings were arranged by the prosecutor, the Petitioner

was unable to present the testimony of many co-defendants familiar with the events in question.

Warren Kimbro and George Sams pleaded guilty to second degree murder before the Petitioner's trial and were major prosecution witnesses. (They have since been pardoned by the State.) Loretta Luckes pleaded guilty to conspiracy charges and testified against the Petitioner. Maude Frances and Aletta Wilson were treated as juveniles and released after six months' pre-trial detention. Landon Williams and Rory Hithe were not extradited back to Connecticut until after the Petitioner's trial. The prosecutor chose to sever the Defendant's case and try him first. At the time when Petitioner's trial began, the remaining Defendants, Ericka Huggins, Margaret Hudgins, Rose Marie Smith, George Edwards and Bobby Seale, were all awaiting separate trials. When called as defense witnesses, Huggins, Smith and Edwards invoked their Fifth Amendment right not to testify because of the pendency of their own trials. (Trial F. XVII (a), R. 353; Trial F XVII (d), R. 354; Trial F. XVII (e), R. 355-6; Trial F. XVII (2) (f), R. 356.) The Petitioner's requests that each witness be granted immunity were denied. (Trial F. 142-146.) Alleged accomplice Frances Carter had already been called as a witness by the prosecutor, invoked her Fifth Amendment privilege and been granted immunity pursuant to Sec. 54-47a Connecticut General Statutes (Trial F. 133).

All of the defense witnesses to whom immunity was denied were eyewitnesses to some or all of the events on which the charges against the Petitioner were based. The only persons who did waive their Fifth Amendment rights were Seale, who was not an eyewitness, and Hudgins, who did not witness all of the events.

The Supreme Court of the State of Connecticut upheld the trial court's rulings.

III. Sometime prior to Petitioner's arrest, the Black Panther Party Headquarters in New Haven was entered and searched by New Haven Police acting without a warrant. (T. 722).

As a result of the search, a tape recorder, tape recordings and a .45 caliber revolver were seized by the police. The Defendant did not own any of these items, nor was possession of them an element of any offense with which he was charged.

The Defendant was one of four members of the Central Staff of the Connecticut Black Panther Party. The Central Staff controlled the party for the State and set policy for it. (T. 715).

Any records of the party and its treasury were kept in the headquarters. (T. 711). The treasury was frequently moved, and was sometimes kept in Mr. Kimbro's bedroom, the room from which the items in question were seized. (T. 715).

The Defendant came and went at will to and from Party Headquarters. (T. 712). Although he evidently did not live there, he did at times sleep there. He used the telephone at the Party Headquarters to transact party business.

Prior to the trial, on February 16, 1970, Defendant moved to suppress the use as evidence of the tape recorder, tape recordings and gun. The motion was denied without prejudice on May 5, 1970 and was renewed at trial.

After a hearing on the motion, the trial judge held that Defendant did not have standing to contest the search and seizure. (T. 716-22).

The Supreme Court of the State of Connecticut affirmed.

REASONS FOR GRANTING THIS WRIT

I

A. THE FREEDOM OF INFORMATION ACT IS NOT GROUNDS FOR QUASHING SUBPOENAS ISSUED TO F.B.I. OFFICIALS DURING A STATE CRIMINAL TRIAL IN ORDER TO COMPEL EVIDENCE AS TO ELECTRONIC SURVEILLANCE OF THE DEFENDANT.

In seeking to enforce his subpoenas against agents of the Federal Bureau of Investigation, Petitioner was asserting his right "to have compulsory process for obtaining witnesses in his favor." U.S. Const., Amend. VI, By subjugating that right to the provisions of 5 U.S.C. §552, the Freedom of Information Act, the Connecticut Supreme Court ignores both basic Constitutional doctrine and prior decisions of this Court upholding the vital nature of the right to compulsory process. This Court has consistently protected the right of a criminal defendant to compel the attendance of witnesses. *United States v. Nixon*, 418 U.S. 683 (1974); *Washington v. Texas*, 388 U.S. 14, 19 (1967).

The sole ground asserted by the F.B.I. for quashing the subpoenas was that 5 U.S.C. §552 (b) (7) shielded the government from disclosing the information sought, and the trial court granted the motion to quash on that basis. The Freedom of Information Act, 5 U.S.C. §552 et seq., creates a judicially enforceable public right to disclosure of information in the control of federal officials, *Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975); *Hawkes v. Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972); *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir. 1972), *cert.*

denied, 409 U.S. 889 (1972). Rights of parties in civil or criminal litigation which already exist are unaltered by the Act, *Environmental Protection Agency v. Mink,* 410 U.S. 73, 85-6 (1973). The rights of persons subject to criminal process or investigation are to be determined without reference thereto. *Williams v. Internal Revenue Service,* 345 F. Supp. 591 (D. Del. 1972), *aff'd,* 479 F.2d 317 (3d Cir. 1973), *cert. denied,* 414 U.S. 1024.

Section 552 (b) (7), and the other exemptions to §552, as well as the exceptions to those exemptions, are not matters for a court to consider unless a party is proceeding under the Act's affirmative right to information. The decision below, if allowed to stand, creates a dangerous precedent for prosecutors' use of the Freedom of Information Act to deny a defendant's rights to discover information and to produce evidence material to his defense.

At the time the subpoenas were issued, Petitioner had a reasonable basis for believing that illegal wiretapping had led to his arrest, since he was apprehended at a Western Union office in Salt Lake City, Utah, following telephone conversations with persons in the Jersey City Black Panther headquarters. Petitioner had been driving across the country and apart from these telephone conversations, no one could have learned of his presence either in Salt Lake City or in that Western Union office. Earlier in the trial, when the arresting F.B.I. agent testified as to his post-arrest conversations with Petitioner, counsel moved for disclosure by the prosecution of any federal electronic surveillance of the New Jersey Black Panther office. This motion was summarily denied by the Court. (Tr. 398). Petitioner's only remaining recourse was to subpoena F.B.I. representatives back to Court to request any Bureau records of such surveillance.

The first subpoena requested information regarding the Jersey City headquarters. Had unlawful electronic

surveillance of that office been revealed, Petitioner's arrest could be shown to be illegal and any statements which flowed from that arrest should have been suppressed under the Fourth Amendment and under 18 U.S.C. §2515 and §2518 (9) and (10). The second subpoena concerned surveillance at 365 Orchard Street, New Haven. There was evidence of numerous phone calls to and from that address during the days prior and subsequent to the death of Alex Rackley. The substance of those conversations may have contained material evidence either corroborating Petitioner's testimony or showing F.B.I. entrapment or other conduct so violative of due process as to require dismissal of all charges. *Roviaro v. United States,* 353 U.S. 53 (1957)*. Petitioner was nonetheless repeatedly

*It is now known that at the time of Petitioner's arrest wire taps were used by the F.B.I. nationally against the Black Panther Party, and particularly its New Haven office. Department of Justice Memoranda from W. R. Wannall to C. D. Brenna, March 25, 1971, and March 29, 1971. *And see* "Intelligence Activities and the Rights of Americans," *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities,* United States Senate, 94th Cong., 2d Sess., Book II, p. 139, and Book III, p. 319. Further, during this period the Black Panther Party was the "primary focus" of the F.B.I.'s convert action program (COINTELPRO) against "Black Nationalist Hate Groups," which included tactics that "were clearly intended to foster violence, and many others that could reasonably have been expected to foster violence," *Id.*, Book III at 187-8. These tactics included "fingering" persons as informants, to ostracize them from the group and foment dissension. *Id.*, Book III, p. 47. In one reported incident, the F.B.I., having learned the whereabouts of a fugitive through electronic surveillance of the Black Panther Party, sent an anonymous letter accussing a member of providing information against him: "How come the F.B.I. pig facist knew where to bust Lonnie and Minnie way out where they were." *Id.*, Book III, p. 47. The letter may demonstrate that Petitioner was a victim of this or similar surveillance.

The trial of this case took place at a time when the F.B.I.'s COINTELPRO was maintained in top secrecy, *Id.*, Book III at 64, and involved direct interference with the judicial process.

denied an opportunity even to ask the preliminary question: was there federal electronic surveillance concerning the case?

B. A TRIAL COURT MAY NOT RULE ON THE ADMISSIBILITY OF STATEMENTS FLOWING FROM AN ALLEGED ILLEGAL ARREST, WITHOUT FIRST DETERMINING THE NATURE OF THE OFFICIAL MISCONDUCT INVOLVED.

The Connecticut Supreme Court misapplied this Court's standards as to suppression of statements flowing from an unlawful arrest under *Brown v. Illinois*, 422 U.S. 590 (1975) when it ruled that Petitioner's statements were voluntary and admissible regardless of any prior illegality. Under *Brown*, the giving of *Miranda* warnings will not purge from a subsequent confession the taint of an arrest made in violation of the Fourth Amendment. Instead, the courts must consider that:

> The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, *particularly the purpose and flagrancy of the official misconduct are all relevant*. . . And the burden of showing admissibility rests, of course, on the prosecution. (emphasis added)

422 U.S. at 603-604. The Connecticut Court relies only on the fact that Petitioner had been given *Miranda* warnings

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The bureau's attempts to interfere with judicial processes affecting targets are particularly disturbing because they violate a fundamental principle of our system of government. Justice is supposed to be blind. Nevertheless, when a target appeared before a judge, a jury, or a probation board, he sometimes carried an unknown burden; the Bureau had gotten there first.

Id., Book III at 58. It was in this context that Petitioner's subpoenas of F.B.I. agents were quashed, solely on the basis of 5 U.S.C. Sec. 552 (b) (7).

prior to making any statements, and had validly waived his Fifth Amendment rights.* On the question of official misconduct the Court found that "Above all, there was no suggestion whatsoever in this case that '[t]he illegality . . . had a quality of purposefulness'" (Appendix, p. 13a).

Yet the trial court had deliberately prevented Petitioner from producing any evidence as to the official misconduct involved. The state never assumed the burden of demonstrating the legality of Petitioner's arrest. The prosecution simply relied on the subsequent *Miranda* warnings. Under *Brown*, the Court could not dispose of the suppression motion without evidence as to the nature of the original Fourth Amendment violation. Resolution of whether the later warnings vitiated the initial illegality depends in part upon the specific official misconduct. Yet the trial court deliberately foreclosed Petitioner from producing any evidence as to that misconduct; neither did the Court require the state to produce evidence as to the arrest itself.

Moreover, if electronic surveillance had led to Petitioner's arrest, and if that surveillance were unlawful under 18 U.S.C. §2518, the federal wiretap statute, then "evidence derived therefrom" had to be excluded, 18 U.S.C. §2515 and §2518 (9) and (10), regardless of whether the taint had been removed under *Wong Sun v. United States*, 371 U.S. 471 (1963). Where electronic wiretapping is concerned, these statutes require suppression, even though the same evidence may be admissible under traditional Fourth Amendment standards. *Gelbard v. United States*, 408 U.S. 41 (1972); *United States v. Calandra*, 414 U.S. 338, 355, n.11 (1974).

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*Petitioner had given a series of statements to F.B.I. and New Haven police officers, beginning shortly after his arrest. The illegality of that arrest would taint every statement, as each flowed directly from the same unlawful police conduct.

In conclusion, the quashing of the subpoenas deprived Petitioner of the opportunity to present evidence with regard to two crucial areas of the case. First, the quashing of the subpoena addressed to the illegal wiretapping in New Jersey prevented Petitioner from producing evidence relating to the suppression of the statements given by him. Second, the quashing of the subpoenas as to electronic surveillance at 365 Orchard Street prevented Petitioner from producing material and potentially exculpatory evidence concerning the merits of the charges against him. The Court should decide this question to prevent the future misuse of the Freedom of Information Act to shield in secrecy information which a criminal defendant is guaranteed under the Sixth Amendment.

II

THE COURT'S REFUSAL TO CONSIDER A MOTION TO CONFER IMMUNITY ON DEFENSE WITNESSES AFTER CONFERRING IMMUNITY ON A PROSECUTION WITNESS DEPRIVED THE PETITIONER OF DUE PROCESS OF LAW.

This Court should grant certiorari to decide this question because there is substantial conflict among Courts of Appeals concerning whether denial of immunity to defense witnesses who invoke the Fifth Amendment constitutes a denial of due process of law. The Court of Appeals for the Third Circuit held in *United States v. Morrison*, 535 F.2d 223, 229 (3rd Cir. 1976):

> There are circumstances under which it appears due process may demand that the Government request use immunity for a defendant's witness.

The Court cited prosecutorial misconduct in threatening prosecution of a witness as one such circumstance.

The *Morrison* court, at 229, ordered a new trial and directed that if the witness in question invoked her Fifth Amendment right not to testify, a judgment of acquittal should enter unless the Government requested use immunity for her testimony.

Similarly, the Court of Appeals for the District of Columbia has recognized that special circumstances such as use by the prosecution of grants of immunity for its own witnesses entitle defendants to grants of immunity for defense witnesses. In *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966) (Burger, J.) *cert. denied*, 388 U.S. 921 (1967) the court said:

> We might have quite different, and more difficult problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for [Defendant's witness] to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denies him due process. Arguments could be advanced that in the particular case the Government could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused. *Id.* at 534 n.1. (emphasis in original).

Again, where the prosecution introduced out-of-court-statements of a co-defendant who could not be called as an involuntary witness, the Court of Appeals for the District of Columbia saw an obligation for the prosecution to seek use immunity for the alleged declarant in order to permit the Defendant to present to the jury rebuttal in the form of cross-examination. *United States v. Leonard*, 494 F.2d 955, 985, n.79 (D.C. Cir. 1974). In *United States v. Gaither*, 539 F.2d 753, 754 (D.C. Cir. 1976), Chief Judge Bazelon pointed out that had the record clearly indicated that the Defendant had sought immunity for a witness,

failure to grant immunity may have seriously affected the fairness of the judicial proceedings.

The Courts of Appeals of other circuits have denied immunity for defense witnesses in cases in which no special circumstances have been raised and have confined their analysis to the authority of courts to extend the federal immunity statute to defendants rather than considering the due process rights of defendants to such extension. See *United States v. Allstate Mortgage Corp.*, 507 F.2d 492 (7th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *United States v. Smith*, 436 F.2d 787 (5th Cir. 1971), *cert. denied*, 402 U.S. 976 (1971); *Cerda v. United States*, 488 F.2d 720 (9th Cir. 1973).

The rights of a criminal defendant to present evidence on his own behalf and to employ compulsory process are fundamental constitutional rights applicable to the states. *Washington v. Texas*, 388 U.S. 14 (1967).

Procedures for granting immunity to witnesses who invoke Fifth Amendment rights constitute a type of compulsory process within the meaning of the Sixth Amendment and therefore should be available to defendants. This Court held in *Wardius v. State of Oregon*, 412 U.S. 470 (1973) that the constitutional validity of state criminal procedures depends on whether the procedures are equally available to the prosecution and the accused, and on whether unfair advantage to the prosecution is created. Since entitlement to compulsory process is a right guaranteed to criminal defendants rather than to the Government, defendants' access to all types of compulsory process must be at least equal to that of the Government. The trial court's refusal to grant immunity to defense witnesses after granting it to a prosecution witness is a denial of due process of law.

The Connecticut immunity statute, Sec. 54-47a Connecticut General Statutes, does not clearly authorize grants of immunity for defense witnesses. However, this Court has held that, in some circumstances, criminal defendants are entitled to affirmative aid to insure that their ability to present a defense is not hampered by the Government's superior resources and access to witnesses. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brady v. Maryland*, 373 U.S. 83 (1963); *Barber v. Page*, 390 U.S. 719 (1968); *Mancusi v. Stubbs*, 408 U.S. 204 (1972). *See also, United States v. Morrison, supra.*

Equal access to grants of testimonial immunity need not entail the "immunity bath" feared in *In Re Kligo*, 484 F.2d 1215, 1222 (4th Cir. 1973), as use immunity and not transactional immunity can be made available as a sufficient safeguard of the rights of witnesses. *Kastigar v. United States*, 406 U.S. 441 (1972). Since granting of use immunity has been held to leave witnesses and prosecutor in the same position as if the witness had claimed his Fifth Amendment privilege, *Id.*, to deny the same device to Defendants is to apply a different standard and to deprive the Defendant of his due process right to present exculpatory evidence and to employ compulsory process. The fact that extra prosecutorial effort may be required to show at a subsequent trial of the witness that no use has been made of the testimony is not recognized as a valid objection to grants of immunity by the Government, and therefore, no such considerations can be the basis for denying use immunity for defense witnesses. *Cf.* Westen, *Compulsory Process*, 73 MICH. L. REV. 71, 166-170 (1974).

III

THE COURT ERRED IN HOLDING THAT PETITIONER LACKED STANDING TO CHALLENGE USE OF EVIDENCE SEIZED AT BLACK PANTHER PARTY CHAPTER HEADQUARTERS.

The Supreme Court of the State of Connecticut in

this case has decided an important constitutional question in a manner which conflicts with the decisions of this court in *Jones v. United States,* 362 U.S. 257 (1960); *Mancusi v. DeForte,* 392 U.S. 364 (1968); and *Katz v. United States,* 389 U.S. 347 (1967). The result of the holding will be to remove Fourth Amendment protections from a substantial number of political groups and other organizations.

The opinion of the Supreme Court of Connecticut turns on the following issues: the fact that the Petitioner was not present at the time of the search; the fact that the premises were leased by an individual (Warren Kimbro) rather than by the Black Panther Party; and the fact that Petitioner may not have spent a great deal of time on the premises. The Court below completely ignored both the character of the premises as the headquarters of a political party and the test set forth in *Katz* and reaffirmed in *Mancusi:*

> . . .[C]apacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. 392 U.S. at 368.

The Connecticut court relied instead on *Brown v. United States,* 411 U.S. 223 (1973), where this Court said:

> [T]here is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.
>
> *Id.* at 229.

Brown, however, was a case which was specifically limited to its facts. *Id.* This Court stated there that petitioners "failed to allege any legitimate interest of any kind in the premises searched . . . ." *Id.* at 229.

In marked contrast to *Brown,* the Petitioner here had an interest in the premises of constitutional dimensions. The premises were the center for the expression by the Petitioner of political views protected by the First Amendment to the Constitution of the United States. The Petitioner was a ranking officer in a political organization which used the premises in question as its headquarters. The trial testimony is undisputed that records and monies of the Black Panther Party were stored at 365 Orchard Street and that policy decisions of the group were made there.

There is no question that the search of 365 Orchard Street was directed against the Black Panther Party. The Fourth Amendment, of course, "protects people, not places." *Katz, supra,* 389 U.S. at 351. In this case, the protected people included officers of the New Haven Black Panther Party Chapter who used the premises as their headquarters.

The relationship of an organizational official to the organization's offices was examined by this Court in *Mancusi v. DeForte,* 392 U.S. 364 (1968). Petitioner in that case was a union officer who was present in an office shared by other union officials when union papers were seized. The papers did not belong to petitioner. The Court stated that the fact that the office was shared rather than a private office did not affect petitioner's standing to assert Fourth Amendment rights. Contrary to the interpretation of the Supreme Court of Connecticut, the case also did not depend on the presence of DeForte at the illegal seizure, but rather depended on his expectation of privacy as a union official in a union office:

> DeForte still could have reasonably expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups. *Id.* at 369.

Petitioner in this case clearly falls within the *Mancusi* rationale. He was a party official; he spent time at the office; the premises used were the living quarters of another party official. Petitioner had a reasonable expectation that the premises would be free from governmental intrusion. Similarly, as a ranking official of the party, he had a sufficient interest in party headquarters to enforce this expectation. *Brown v. United States, supra,* does nothing to abrogate this right.

The items introduced into evidence included a tape recording prepared by Petitioner's organization. The rationale of the Connecticut court for admitting these items would be as applicable to membership lists, corporate papers, and minutes of meetings of the organization as it was to the items which were introduced in evidence in this case.

As an officer of a political group, Petitioner here had standing to assert the right of his organization to be free from governmental intrusion. To hold that such an officer cannot assert this right will severely decrease the scope and purpose of the Fourth Amendment as delineated by the decisions of this Court in cases such as *Mancusi* and *Katz.*

Additionally, the reliance of the Connecticut court on proprietary matters such as who held the lease on the premises and who slept there is misplaced. Dissident political organizations, for financial and other reasons, often do not own or lease property in the name of the organization. The premises were treated as party headquarters by the New Haven police as well as the Petitioner in this case. This Court should grant certiorari on this issue to clarify what nexus must exist between an individual and a political organization in order to confer standing on that individual to assert Fourth Amendment rights in a Court of Law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of the State of Connecticut should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing were sent, postage prepaid, on this first day of July, 1977, to Attorney Arnold Markle, State's Attorney, 235 Church Street, New Haven, Connecticut.

THEODORE I. KOSKOFF

APPENDIX

OPINION BELOW

SUPREME COURT
OF THE STATE OF CONNECTICUT

December Term 1976

STATE OF CONNECTICUT v. LONNIE McLUCAS

HOUSE, C. J., LOISELLE, BOGDANSKI,
LONGO AND BARBER, JS.

Argued December 10, 1976 — decision released March 15, 1977

BARBER, J. The defendant was charged with the following violations of the General Statutes (Rev. to 1968): by indictment with the crime of kidnapping resulting in death in violation of General Statutes §53-27, and by information with the crimes of conspiracy to commit kidnapping in violation of §53-27, conspiracy to commit murder in violation of §54-197, and with the crime of binding with intent to commit crime in violation of §53-19. A jury found the defendant guilty of conspiracy to commit the crime of murder and not guilty of the other crimes. The defendant has appealed from the judgment rendered, assigning as error a number of rulings by the trial court.

A brief statement of some of the background facts, not disputed by the parties, will put the issues in proper perspective. The charges against the defendant, Lonnie McLucas, all arose out of events culminating in the death of Alex Rackley. The defendant and others had estab-

lished a branch of the Black Panther Party in New Haven. The conspiracy to murder Rackley was alleged to have developed during the period of May 18 through May 21, 1969, and was alleged to have included several members and affiliates of the Black Panther Party in New Haven. Those charged included the national party chairman, Bobby Seale, who was indicted for participation in the murder and was alleged to have given the order that Rackley be killed. The state contended that Rackley was tortured and killed because he was suspected of being a police informer. A number of those charged with being involved in the murder entered guilty pleas. Two pleaded guilty to second degree murder, two pleaded guilty to conspiracy to commit murder, three pleaded guilty to aggravated assault, and one pleaded guilty to conspiracy to commit kidnapping. All charges against Bobby Seale were dismissed after a lengthy trial ended in a hung jury. The defendant was tried alone after being denied a joint trial with several other defendants. It is undisputed that Rackley was "disciplined" by torture and then was bound and driven to a swamp in Middlefield. During the trial, the defendant described his participation in the events and admitted that after Rackley had been taken to a wooded area and had been shot once, he, McLucas, was given the gun and fired a second shot. The defendant's defense for his actions was predicated on the claim of an overwhelming fear of, and coercion by, another alleged participant, George Sams, whom the defendant sought to portray as a madman. The state contended that Rackley was tortured and killed not because of pressure from one individual, Sams, but because he was suspected of being a police informer within the Black Panther Party.

The court made a finding on each of the rulings involved in this appeal, which finding includes such facts as were considered incidental to each of the respective rulings.

I

Prior to the trial, the defendant moved to suppress as evidence a tape recorder, tape recordings and a .45 caliber revolver which had been seized from an apartment at 365 Orchard Street in New Haven. The motion was denied without prejudice to the defendant's right to renew it at the time of trial. There was subsequently a full hearing on the motion at the time of trial. The defendant claimed that he had standing to challenge the search on the basis of his membership on the central staff of the Black Panther Party. The court concluded that the defendant did not have standing to challenge the search and seizure in that he was not on the premises at the time of the seizure and had no possessory interest in either the premises or the articles seized. "[T]here is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown v. United States*, 411 U.S. 223, 229, 93 S. Ct. 1565, 36 L. Ed. 2d 208. A person may have a possessory interest in the premises searched even though he has no title to the premises. *Mancusi v. DeForte*, 392 U.S. 364, 367-68, 88 S. Ct. 2120, 20 L. Ed. 2d 1154; *Jones v. United States*, 362 U.S. 257, 265, 80 S. Ct. 725, 4 L. Ed. 2d 697; *State v. Darwin*, 161 Conn. 413, 419, 288 A.2d 422. The defendant had the burden of establishing the facts necessary to demonstrate a basis for standing to attack the search and seizure. See *Combs v. United States*, 408 U.S. 224, 227, 92 S. Ct. 2284, 33 L. Ed. 2d 308. It has been made clear that capacity to claim the protection of the fourth amendment depends not upon a property right in the premises searched but upon whether the area was one in which there was a reasonable expectation of freedom from governmental

intrusion. *Mancusi v. DeForte*, supra, 368; *Katz v. United States*, 389 U.S. 347, 352, 88 S. Ct. 507, 19 L. Ed. 2d 576. It is evident that the defendant was not charged with an offense that had as an essential element the possession of seized evidence at the time of the search and seizure. See *Brown v. United States*, supra. In addition, it appears from the finding that the defendant was not at the apartment when the police entered and the seizure occurred, and the articles neither belonged to the defendant nor were they in his custody at the time they were seized.

In this case, the critical issue on the defendant's motion to suppress as evidence the property seized is whether, in light of all the circumstances, the defendant had a possessory interest in the searched premises at 365 Orchard Street such that those premises constituted an area in which the defendant had a "reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, supra. In *Mancusi*, the defendant union official was found to have standing to object to the seizure of certain union records. The papers were taken from an office which was used for union purposes and which the defendant shared with several other union officials. It was stipulated that he spent a considerable amount of time in that office, and that he had custody of the papers at the moment of their seizure. He was present in the office during the seizure, and protested the taking of the papers. In marked contrast, it appears from the finding in the present case that Warren Kimbro was the person who resided in, and paid the rent for, the apartment at 365 Orchard Street; that the defendant did not live in this apartment, had no proprietary interest in it, and had only stayed overnight there once; that the defendant had no possessory interest in the articles seized; that the Black Panther group in New Haven held meetings at Warren Kimbro's apartment; and that the apartment was mainly a residence and only sometimes used for office purposes by the Black Panther group. In further contrast to the situation in

Mancusi, in the present case there was no stipulation or finding that the defendant had custody of the items at the moment of seizure. The defendant's reliance on *State v. Darwin*, 161 Conn. 413, 288 A.2d 422, is also misplaced. In that case, we held (p. 420) that a husband had standing to challenge a search and seizure involving his wife's automobile because "[t]o hold . . . that a vehicle titularly owned by a wife is not also owned by the husband for purposes of search and seizure would seem to be an improper stretching of technicalities." Such a situation is clearly distinguishable from the remote connection which the defendant had with the premises in question here. The conclusions of the trial court set forth in the finding must stand if they are legally and logically consistent with the subordinate facts found unless they involve the application of some erroneous rule of law material to the case. *State v. Bowen*, 167 Conn. 526, 531, 356 A.2d 162; *Consiglio v. Warden*, 160 Conn. 151, 157, 276 A.2d 773. We have examined the subordinate facts in the finding relating to this issue and are of the opinion both that they support the conclusions reached and that those conclusions involve no erroneous rule of law.

II

The defendant moved to suppress statements made by him to officers in Salt Lake City, Utah, before voluntarily returning to this state, and a statement made by him to Sergeant Vincent J. DeRosa in New Haven on June 11, 1969. There was a full hearing on the motion to suppress statements at the time of trial. A detailed recital of all the facts contained in the voluminous finding would unduly lengthen this opinion, but we do include the following summary of the facts found by the court: On June 6, 1969, the Salt Lake City office of the Federal Bureau of Investigation (hereinafter referred to as the F.B.I.) had received a call from the bureau's New York office that two individuals for whom the New York office had fugi-

tive warrants would possibly stop at the Western Union office in Salt Lake City. The bureau had a fugitive warrant for the defendant who arrived at the Western Union office on June 6, 1969. The defendant was taken into custody and advised of his rights. At the F.B.I. office in Salt Lake City, he was charged with unlawful flight to avoid prosecution and was informed of the Connecticut warrant charging him with conspiracy, murder, kidnapping and other crimes. The defendant signed a formal, written statement of his rights, which statement included a waiver of his right to an attorney. It was explained to the defendant that he did not have to sign the form. Thereafter, Lynn G. Twede, an agent for the F.B.I., interviewed the defendant briefly before he was taken to be presented before a United States commissioner. The defendant indicated to Twede that he (the defendant) knew who had killed Alex Rackley and that he could produce witnesses, but he wanted assurances that he would not have to testify.

Sergeant DeRosa first saw the defendant in Salt Lake City on June 8, 1969. At that time the defendant signed a form containing the "Miranda" warnings and indicated that he understood them. At the time, and in the presence of Sergeants DeRosa and Nicholas Pastore of the New Haven police department, and two agents of the F.B.I., the defendant further indicated that he would be willing to talk about the investigation of the case. It does not appear what conversation subsequently took place on June 8, 1969. On June 9, 1969, the defendant was at the Salt Lake County courthouse with a lawyer. Sergeant DeRosa had not known on the previous day that an attorney had been appointed for the defendant. After conferring with his attorney, the defendant waived extradition and left Salt Lake City by airplane on June 10, 1969, with Sergeants DeRosa and Pastore. It does not appear what statements relative to the case under investigation were made by the defendant during the course of the plane

trip. Sergeant DeRosa did show the defendant photographs of some of the people involved in the investigation and disclosed parts of statements which had been taken from others and which might tend to incriminate him. The defendant was arraigned in the Superior Court at New Haven on June 11, 1969. The clerk of the court informed the defendant of his rights but did not tell the defendant that if he could not afford an attorney one would be appointed for him. After the defendant was arraigned on June 11, 1969, he was given two warnings of his constitutional rights. The second warning forms a part of a statement that was reduced to typewritten form.

The defendant waived extradition, entered this state voluntarily, and was put to plea in this case. No question was raised as to the defendant's arrest in Salt Lake City prior to voluntarily returning to this jurisdiction, and none was ever made to the trial court. The defendant, however, issued subpoenas to the F.B.I. seeking information on the legality of his arrest when the motion for suppression was being heard. Those subpoenas were quashed on motion of the assistant United States attorney.

The court concluded that the defendant in all stages of the proceeding on June 11, 1969, had his constitutional rights explained to him and that he voluntarily, knowingly and intelligently waived those rights. The court further concluded that the tape of the defendant's interview on June 11, 1969, and the taped statement of such interview were voluntarily given and should be admitted as evidence, and that the motion to quash the subpoenas, which was made by the United States, should be granted on the basis of 5 U.S.C. §552 (b) (7).

In attacking the admissions of statements made to officers in Salt Lake City, the defendant contends that such statements made by him while in custody should have been suppressed because an attorney had been appointed

to represent him by a United States commissioner. The difficulties with the defendant's argument are that he does not particularize what statements are involved and he misplaces his reliance on the case of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. The *Miranda* case holds that no effective waiver of right to counsel during interrogation can be recognized unless specifically made after the person interrogated has been apprised of his rights by being given the "Miranda" warnings. Despite the defendant's assertion, it does not hold that "[o]nce a criminal defendant is represented by counsel, he cannot waive any of his so-called 'Miranda' rights without his attorney's aid and advice." See *United States v. Hall*, 523 F.2d 665, 668 n.4 (2d Cir.); *United States v. Diggs*, 497 F.2d 391, 393 (2d Cir.); *Moore v. Wolff*, 495 F.2d 35, 36-37 (8th Cir.);*United States v. Cobbs*, 481 F.2d 196, 199 (3d Cir.); *United States v. Barone*, 467 F.2d 247, 249 (2d Cir.). As stated in *Moore v. Wolff*, supra, 37: "If an accused can voluntarily, knowingly, and intelligently waive his right to counsel before one has been appointed, there seems no compelling reason to hold that he may not voluntarily, knowingly, and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. Of course, the Government will have a heavy burden to show that the waiver was knowingly and intelligently made, *Miranda v. Arizona*, [384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694] but we perceive no compelling reason to adopt the per se rule advocated by petitioner." In similar circumstances, the court held that "[s]ince there was no coercion or deception and [the defendant] waived his right to counsel, the [F.B.I.] agents were not required, before taking his voluntary statement, to seek out the attorney who had been appointed." *United States v. Hall*, supra. This is not a case where the defendant waived his right to counsel without full knowledge of the crimes of which he was suspected. See *United States v. Diggs*, supra, 393 n.3. There is no showing that the defendant ever requested that an attorney be present or

indicated a desire to remain silent. See *State v. Moscone*, Conn. (38 Conn. L.J., No. 9, p. 7). In the present case the facts establish beyond any doubt that the state's burden was discharged and that the defendant's waiver was voluntarily, knowingly and intelligently made.

In attacking the admission of the statement made to Sergeant DeRosa in New Haven on June 11, 1969, the defendant contends that it was tainted by a possible illegal arrest of the defendant by the F.B.I. in Salt Lake City. The defendant suspected that his arrest might have been aided by the use of illegal electronic surveillance. The defendant argues that in the case of an illegal arrest the statement given by him on June 11, 1969, was the "fruit of the poisonous tree" and should have been suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441. In attempting to pursue his suspicion that electronic eavesdropping had been involved in his arrest, the defendant issued two subpoenas directed to several F.B.I. agents, seeking to compel them to appear and bring certain electronic surveillance documents. The first subpoena sought information as to whether the F.B.I. had received information regarding the defendant's presence in Salt Lake City through electronic surveillance or wiretapping of the Jersey City Black Panther office or from an informant or from disclosure by Western Union. The second subpoena had to do with wiretapping devices, if any, of Warren Kimbro's apartment at 365 Orchard Street, New Haven, although the defendant did not claim that there were any wiretapping devices there. The court granted the motion to quash of the assistant United States attorney on the basis of 5 U.S.C. §552 (b) (7). At the time of trial, 5 U.S.C. §552 established the guidelines for public access to information held by a federal agency, while 5 U.S.C. §552 (b) (7) exempted from the general disclosure requirements "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." In his

brief, the defendant apparently seeks to come within the exception of 5 U.S.C. §552 (b) (7) for disclosure of matter "available by law to a party" by his discussion of 18 U.S.C. §2518 (8) (d), which provides for notice of electronic surveillance to "persons named in the [wiretap] order or the application, and such other parties to intercepted communications as the judge may determine...." The defendant did not actually claim that there were any wiretapping devices at Warren Kimbro's apartment, and the rest of his allegations are equally speculative. Federal wiretapping legislation at the time of trial provided that an "aggrieved person" could move to suppress "the contents of any intercepted wire or oral communication, or evidence derived therefrom" on the ground of its unlawful interception; 18 U.S.C. §2518 (10) (a); and defined such an aggrieved person as one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U.S.C. §2510 (11). In assessing claims of suspected illegal electronic surveillance, courts have looked for a relatively precise showing of the facts which reasonably have led a person to believe he has been subjected to undisclosed electronic surveillance, and have disapproved of speculative claims which lack sufficient precision and substantiation. See, e.g., *United States v. See*, 505 F.2d 845, 856 (5th Cir.), affidavits vague and conclusory to the point of being a fishing expedition; *United States v. Alter*, 482 F.2d 1016, 1026 (9th Cir.); *Cohen v. United States*, 378 F.2d 751, 761 (9th Cir.); *People v. Cruz*, 34 N.Y. 2d 362, 314 N.E. 2d 39. The defendant's contention that he would be a party entitled by law to access to the F.B.I.'s investigative material and wiretap data because 18 U.S.C. §2518 (8) (d) "mandates eventual wiretap notice" appears rather tenuous.[1]

[1] See *State v. DeMartin*, Conn. (38 Conn. L.J., No. 10, pp. 1, 4), which contains a detailed history and discussion of present federal and state statutes relating to electronic surveillance.

The defendant also argues that he was denied his sixth amendment right to have compulsory process for obtaining witnesses in his favor by the fact that F.B.I. agent Twede testified for the state while the defendant was prevented, by the quashing of his subpoenas, from compelling certain other F.B.I. agents to appear and bring electronic surveillance documents. The defendant relies entirely on *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019, for his contention that the sixth amendment mandated that he have access to the alleged wiretap information under these circumstances. In *Washington v. Texas*, supra, the United States Supreme Court (p. 22) found that the federal constitution was violated by two Texas statutes which allowed a participant in a crime to testify for the prosecution but not for a defendant coparticipant and thereby established "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of a priori categories that presume them unworthy of "belief." Such a situation is certainly distinguishable from the facts of the present case. The defendant was nowhere deliberately prevented from presenting his version of the facts. There was no statute or rule making the testimony of F.B.I. agents available to, and competent evidence for, the state but not for the defendant. The quashing of the defendant's subpoenas had to do with the conjectural nature of his claims rather than with any discriminatory and arbitrary statutory scheme.

The issue of whether the court erred in quashing the subpoenas would not be dispositive of whether the defendant's statement to Sergeant DeRosa was admissible. This is because even were we to assume[2] the illegality of

[2]This assumption, however, appears remote in light of the recent decision in *United States v. Donovan*, U.S. , 20 Crim. Law Rep. (Jan. 18, 1977) 3043.

the defendant's arrest in Salt Lake City this would not end our inquiry under the "poisonous tree" doctrine of *Wong Sun v. United States*, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441. In his brief the defendant has relied heavily on the wiretap question and his inability to probe the legality of his original arrest. Under the facts of this case, however, the central and dispositive issue is, rather, the voluntariness of the defendant's statement and whether such voluntariness is sufficient to sever any causal relationship between any prior illegality and the statement. "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' [Citation omitted.]" *Wong Sun v. United States*, supra. The question of whether a statement is sufficiently voluntary under *Wong Sun* to be deemed independent of any prior illegality must be resolved upon the facts of each case. No single fact is dispositive, and the burden of showing the admissibility of the statement rests upon the state. *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S. Ct. 2254, 45 L. Ed. 2d 416. The *Miranda* warnings are an important factor in determining the voluntariness of the statement, and other relevant factors are the temporal proximity of the arrest and the statement, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct. Ibid. In the present case, the claimed illegality is that an illegal search (a wiretap) occurred in which information was obtained as to the location of the defendant for whom the authorities already had a valid arrest warrant. Days and not two hours as in *Brown v. Illinois*, supra, separated the initial arrest on June 6, 1969, Sergeant DeRosa's first meeting with the defendant on June 8, 1969, and the defendant's statement to

DeRosa on June 11, 1969, which was the object of the motion to suppress. The defendant had repeatedly been given his *Miranda* warnings and had indicated that he understood them and still wished to waive his rights. It appears from the finding that it was the defendant who sought to initiate a bargaining process by indicating that he had information regarding Rackley's murder but wanted assurances that he would not have to testify. See *United States v. Mullens*, 536 F.2d 997, 1000 (2d Cir.). The defendant was fully aware of the charges facing him, and there is no intimation that the defendant did not fully understand the consequences of his actions. Ibid. As the United States Supreme Court has recently emphasized, in finding that a defendant's consent to a police search of his automobile was voluntary, "[t]here is no indication in this record that [the defendant] was a newcomer to the law, mentally deficient, or unable in the face of custodial arrest to exercise a free choice." *United States v. Watson*, 423 U.S. 411, 424-25, 96 S. Ct. 820, 46 L. Ed. 2d 598. There is no indication in the finding that any promises were made or that there were "more subtle forms of coercion that might flaw his judgment." Id., 424. The fact of custody alone "has never been enough in itself to demonstrate a coerced confession or consent to search." Ibid. Although *United States v. Watson*, supra, involved a legal arrest and, therefore, a lesser burden of proof on the state because there was no taint of illegality to purge; see *State v. Traub*, 151 Conn. 246, 249, 196 A.2d 755, cert. denied, 377 U.S. 960, 84 S. Ct. 1637, 12 L. Ed. 2d 503; the same factors are relevant in determining the voluntariness of the defendant's statement in the present case. Above all, there was no suggestion whatsoever in this case that "[t]he illegality . . . had a quality of purposefulness. The impropriety of the arrest was obvious . . . . The manner in which [the] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Brown v. Illinois*, supra, 605. Nor was any police overreaching or overt act or threat of force proved or

claimed. See *United States v. Watson*, supra, 424; *United States v. Mullens*, supra. In short, there was ample evidence on which the court could base its conclusion that the defendant's statement was completely voluntary, "an act of free will unaffected by the initial illegality." *Brown v. Illinois*, supra; see *State v. Traub*, supra. The court therefore did not err in admitting the defendant's statement to Sergeant DeRosa.

III

Prior to the trial the state moved to sever the trial of the defendant from that of others alleged to be involved in the death of Alex Rackley. Over the defendant's opposition the court granted the state's motion. Subsequently, the defendant moved that he be tried after the other defendants or, in the alternative, together with the others, and, finally, that immunity be granted to certain witnesses. Those motions were denied. The defendant assigns as error the action of the trial court on those motions. The defendant argues (1) that he had a right to be tried together with the others, (2) that he could waive the right to be tried separately, and (3) that the court should have granted his request for immunity of the witnesses facing charges arising out of the same subject matter.

Ordinarily it is the defendant who moves for a separate trial and when he does so the determination of the motion is within the discretion of the court. *State v. Holup*, 167 Conn. 240, 244, 355 A.2d 119; *State v. Klein*, 97 Conn. 321, 324, 116 A.596. "[C]ases arise where the defenses of the different parties are antagonistic, or where evidence will be introduced against one which will not be admissible against others. Where from the nature of the case it appears that a joint trial will probably be prejudicial to the rights of one or more of the parties, a separate trial should be granted when properly requested." *State v. Brauneis*, 84 Conn. 222, 226, 79 A. 70. A motion for a sepa-

rate trial can be determined only on the basis of whether at the time "it appears that a joint trial will probably result in substantial injustice." *State v. Castelli*, 92 Conn. 58, 63, 101 A.476; *State v. Holup*, supra, 245. A similar test should be applied when the prosecutor makes the motion for a separate trial. See ABA, Standards Relating to Joinder and Severance (1968) §2.3 (b). At the time of trial our rules of practice permitted joinder or defendants, subject to the power of the court to order separate trials. Practice Book §532.[3]

The state based its motion on (1) the fact that it had a statement from the defendant and that the statement could not be used in a trial involving several defendants together because of the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476; (2) the defendant had been informed against individually by indictment and substituted information; and (3) the defendant was not on the Orchard Street premises at the time that the arrests and searches incident to said arrests were made there and that, therefore, he would have a different status from the others insofar as standing regarding a motion to suppress was concerned.

The *Bruton* case holds that the introduction into evidence in a joint trial of a confession implicating the defendant and made by a codefendant who does not testify is improper and cannot be cured by jury instructions. See *State v. Hunt*, 154 Conn. 517, 227 A.2d 69, vacated and remanded, 392 U.S. 304, 88 S. Ct. 2063, 20 L. Ed. 2d 1110, for further consideration in the light of *Bruton v. United States*, supra, and *Roberts v. Russell*, 392 U.S. 293, 88 S.

[3]Our new rules of criminal procedure (effective October 1, 1976) provide that each defendant shall be charged in a separate indictment or information; Practice Book §2036; and that upon order two or more indictments or informations against different defendants may be tried together. Practice Book §2240.

Ct. 1921, 20 L. Ed. 2d 1100. The defendant argues that he did testify at the trial and at all times intended to do so. The short answer to this argument is that at the time the motion was heard there was no sure way of knowing whether the defendant would take the witness stand and expose himself to cross-examination. Under the circumstances the court did not abuse its discretion in granting a separate trial on the ground that the defendant had made a confession incriminating other codefendants. *State v. Klein*, supra, 324; see *State v. Castelli*, supra. It is unnecessary to consider the further grounds for a separate trial except to note that they had a tendency to bolster the state's first ground for a separate trial.

The defendant asserts that the right to be tried separately from one's codefendants is a right which belongs to an accused and can be waived. Of course there is no constitutional or absolute right to a separate trial. 5 Wharton, Criminal Law and Procedure (Anderson) §§1943, 1944; see annot., 59 A.L.R. 2d 841. Assuming the ability of an accused in a proper case to waive a right to a separate trial, that right does not necessarily carry with it the right to insist upon the opposite of that right, in this case a joint trial. See *Singer v. United States*, 380 U.S. 24, 34-35, 85 S. Ct. 783, 13 L. Ed. 2d 630.

The defendant further contends that once the court had granted the motion for a separate trial, it should have granted the defendant's requests for immunity of witnesses facing charges arising out of the same subject matter. We have recently considered the issue of immunity and have held that there is no authority for a court in this state to grant immunity to an accused's witnesses, and General Statutes §54-47a does not apply. *State v. Simms*, 170 Conn. 206, 210-11, 365 A.2d 821. As in *Simms*, the defendant in this case has failed to cite any case that supports his claim. We find no merit to the defendant's claim.

IV

The defendant next claims that the court erred in excluding the testimony of three witnesses regarding the character, mental stability, prior violent and erratic behavior, and reputation for truthfulness of George Sams. Sams was an accomplice in the Alex Rackley murder who testified as a state's witness against the defendant at trial after having pleaded guilty to second degree murder prior to trial. The defendant claims alternatively that the evidence had relevance either on the question of Sams' credibility or on the defense of his own state of mind based on the alleged duress caused by Sams. The testimony proffered by the defendant's witnesses concerned how others perceived Sams, with no attempt to show that the defendant personally was aware of Sams' alleged reputation and prior acts of violence at the time the defendant himself was participating in the murder conspiracy culminating in the death of Rackley. Thus, such testimony would have been irrelevant to the issue of the defendant's own alleged fear of Sams. The defendant testified at trial that he only knew "a little" about Sams, which was that Sams had been expelled from the Black Panther Party because of a stabbing incident. The defense was in fact allowed to present testimony regarding Sams' erratic behavior, his reputation for mental instability, his violence and his reputation for veracity. In addition, a psychiatrist appointed to determine Sams' competency to testify was used as a defense witness on the question of Sams' mental stability and propensity for violence during the events leading up to Rackley's murder. The court did not err in excluding the testimony of the other witnesses concerning their knowledge of Sams' reputation for mental instability and violent behavior and his previous acts of violence. The trial court has broad discretion in determining the relevancy of evidence. *State v. Mullings*, 166 Conn. 268, 279, 348 A.2d 645; *State v. Lombardo*, 163 Conn. 241, 243, 304 A.2d 36; *Johnson v. Newell*, 160 Conn.

269, 277, 278 A.2d 776. There was no abuse of this discretion on the facts presented here. It was error for the court to refuse to permit the three witnesses to testify to Sams' reputation for veracity. See *Creer v. Active Auto Exchange, Inc.*, 99 Conn. 266, 278, 121 A. 888; Holden and Daly, Connecticut Evidence §125 b (3); McCormick, Evidence (2d Ed.) §44. The court realized its error and attempted to cure it by admitting the testimony of a fourth witness as to Sams' reputation for truthfulness in the community, and the witness testified that Sams had no reputation for truthfulness and had a reputation for being a "crazy liar." Sams himself testified that he was sometimes called "Crazy George" or "Madman George." "In order to constitute reversible error . . . the rulings must have been both wrong and harmful." *State v. Tropiano*, 158 Conn. 412, 427, 262 A.2d 147, cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288. Under the circumstances, the error in excluding the testimony of the other three witnesses was harmless.

V

Prior to trial the defendant moved to dismiss the indictment on the ground that the grand jury was unconstitutionally selected. Subsequently the defendant challenged the jury array and moved to dismiss the jury panel on the ground that it was unconstitutionally and unlawfully selected. Both motions were denied. The defendant, conceding in his brief that recent decisions of this court are controlling on both motions and will result in affirmance of the trial court's rulings, does not further brief those motions. See *State v. Brown*, 169 Conn. 692, 696, 364 A.2d 186 (jury array); *State v. Hart*, 169 Conn. 428, 433, 363 A.2d 80 (jury array); *State v. Townsend*, 167 Conn. 539, 545, 356 A.2d 125 (jury array); *State v. Cobbs*, 164 Conn. 402, 406-15, 324 A.2d 234 (grand jury), cert. denied, 414 U.S. 976, 94 S. Ct. 77, 38 L. Ed. 2d 112. We agree that those recent cases are sufficient authority to support the

action of the court denying the defendant's motions challenging the selection of the grand jury and the jury array.

VI

Finally the defendant assigns error in the denial of his motion to dismiss on the ground that the state's attorneys are appointed by the judges of the Superior Court and that such relationship results in a violation of the constitutional doctrine of separation of powers as well as in a denial of due process of law. In his brief, the defendant states that he does not brief this assignment of error in view of the court's holding in *State v. Moynahan*, 164 Conn. 560, 567, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219. There is no merit to the defendant's claim relating to the denial of his motion to dismiss because of the method of appointing state's attorneys. *State v. Moynahan*, supra.

There is no error.

In this opinion the other judges concurred.

SUPREME COURT
OF THE STATE OF CONNECTICUT

New Haven County, December Term, 1976

7836

State of Connecticut v. Lonnie McLucas

Criminal Superior Court No. 15,672
September 30, 1970

Defendant-Appellant's Motion to Reargue

Pursuant to Section 702, *et. seq.* of the Connecticut Practice Book, defendant-appellant in the above-captioned case moves this Honorable Court to hear reargument in this case. Reargument should be allowed in this case to allow the defense to demonstrate the prejudice that resulted from the trial court's exclusion of three witnesses whom the defense called to testify to George Sams' reputation for untruthfulness and, furthermore, to show that the prejudice inflicted by excluding this testimony could not be cured by admitting the testimony of a subsequently called witness who did testify regarding George Sams; *State v. McLucas*, 38 Conn. L.J., No. 37, P. 1, 8 (March 15, 1977).

THE DEFENDANT-APPELLANT

STATE OF CONNECTICUT
SUPREME COURT

New Haven, Conn.

April 14, 1977

Please take notice that the Supreme Court has decided the following:

#7836 (15672) State of Connecticut vs. Lonnie McLucas

"April 5, 1977. The defendant's motion to reargue is denied. By the Court, House, C. J."

Nicholas J. Cimmino, *Clerk*

STATUTES INVOLVED

Amendment IV, Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V, Constitution of the United States:

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . .

Amendment VI, Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, Sec. 1, Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 54-47a, Connecticut General Statutes:

Whenever in the judgment of a state's attorney or the chief prosecuting attorney of the circuit court the testimony of any witness, or the production of books, papers or other evidence of any witness, in any criminal proceeding involving narcotics, gambling or felonious crimes of violence, before a court or grand jury of this state, is necessary to the public interest, the state's attorney, or the chief prosecuting attorney of the circuit court, may, with notice to the witness, after the witness has claimed his privilege against self-incrimination, make application to the superior or circuit court for an order directing the witness to testify or produce evidence subject to the provisions of this section. Upon the issuance of such order such witness shall not be excused from testifying or from producing books, papers or other evidence in such case

or proceeding on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, shall be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence. Whenever evidence is objected to as inadmissible because it was discovered as a result of or otherwise derived from compelled testimony or evidence, the burden shall be upon the person offering the challenged evidence to establish a source independent of the compelled testimony or evidence. (P.A. 631, 1969).

Title 5 U.S.C. Sec. 552 (b) (7):

(b) This section [allowing access to government information] does not apply to matters that are:

...(7) investigating files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

Title 18 U.S.C. Sec. 2515:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Title 18 U.S.C. Sec. 2518:

* * * * *

...(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518 (7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This

ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.